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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. 88-_____

ASHLEY TRANSFER & STORAGE CO., INC.;
DALE J. COOK MOVING AND STORAGE, INC.;
THOMAS W. BIVENS, SR.; AND JOHN D. COOK,

Petitioners

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The attorneys for the Petitioners above-named petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit that vacated a dismissal by the trial judge of one of the counts in a two count indictment and remanded it for a new trial.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit vacating the dismissal of one count of a two count indictment and remanding it for a new trial was decided on October 3, 1988, and is reported as United States of America v. Ashley Transfer & Storage Co., Inc., 858 F.2d. 221, (4th Cir. 1988) and is reprinted in the Appendix to this Petition at A-1. The Order denying the Petition for Rehearing with Suggestion for Rehearing In Banc was filed on November 16, 1988, and is reprinted in the Appendix to this Petition at A-27.

JURISDICTION

Jurisdiction of this Court is found in Title 28 United States Code, Section 1254(1) 1976 and in Supreme Court Rule 17.1(c) in that a federal court of appeals has decided a federal question in a way in conflict with

applicable decision of this Court and in Supreme Court Rule 17.1(a) in that a federal court of appeals has rendered a decision in conflict with the decisions of other federal courts of appeals on the same matter.

CONSTITUTIONAL PROVISION INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall "be subject for the same offense to be put twice in jeopardy of life or limb".

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 United States Code, Section 1, provides in pertinent part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

> declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, ...

2. Title 18 United States Code, Section 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The Petitioners are two moving and storage companies, Ashley Transfer & Storage Co., Inc and Dale J. Cook Moving and Storage, Inc. and two individuals, John D. Cook

(President of Dale J. Cook Moving and Storage) and Thomas W. Bivens, Sr. (President of Bivens Moving and Storage). Thomas Bivens' company had operated a moving and storage company but at the time of trial, the corporation no longer existed. Raymond Harshaw, who was Vice-President of Ashley Transfer & Storage and a defendant at the trial, died shortly after the decision below was filed. The Petitioners operated moving and storage companies in Charleston, South Carolina, and at various times contracted with the United States military to provide moving and storage services to military personnel being transferred overseas.

Count I of the indictment alleged that the Petitioners had conspired to fix prices charged to the United States for storage services at three military bases in South Carolina in violation of Section One of the

Sherman Act. Count II alleged that the Petitioners had conspired to defraud the United States in violation of Title 18, United States Code, Section 371.

Both counts relied on the same factual allegations concerning: (1) the time frame of the conspiracy; (2) the coconspirators; (3) the acts alleged; and (4) the methods by which the alleged conspiracies were carried out. The Government used substantially the same evidence at trial to prove both counts.

The district court refused to submit Count II to the jury because the trial judge decided that he would not sentence the Petitioners under both counts even if the jury found them guilty of both. The district court never expressly ruled on the multiplicity argument raised in the Petitioners' motion to elect, but it implicitly approved the motion because it

said that the Petitioners "committed only one crime" and "should be tried for that one crime". The court also remarked that "the conspiracy to violate the antitrust law is totally subsumed by the conspiracy to defraud", and that the Petitioners should not be "double dipped".

Count I which charged the Petitioners with violating the Sherman Act was submitted to the jury and all were found not guilty. Count II was formally dismissed in a form order after the jury returned the verdict of not guilty on Count I.

The government appealed the district court's refusal to submit Count II to the jury to the Fourth Circuit Court of Appeals and asked for a new trial of the Petitioners on Count II. The Petitioners took the position in the appeal, inter alia, that a retrial on Count II was barred by that

portion of the double jeopardy clause of the Constitution known as the doctrine of collateral estoppel. Simply put, the Petitioners submitted to the court below that when the jury found the Petitioners not guilty of Count I, the jury decided that no conspiracy existed among them and a new trial would be barred because the government would be collaterally estopped from retrying the same conspiracy in a subsequent trial.

Following the command of Ashe v. Swenson, 397 U.S. 436 (1970), the court below examined the entire record of the district court proceedings and determined that the jury must have acquitted the Petitioners on a finding that no conspiracy existed among them, notwithstanding the government's position that the jury could have based its verdict on a finding that the government failed to prove that the Petitioners'

activities impacted on interstate or foreign commerce. The court stated that ordinarily the government would be collaterally estopped from retrying the conspiracy charge in a subsequent trial because the jury found there was no conspiracy. However, the court below ruled that the government could try the same conspiracy again because the court concluded that the Petitioners induced the district court judge not to submit Count II to the jury and eventually to dismiss it. Under these circumstances, the court held, the Petitioners may not assert collateral estoppel as a bar against a second trial. In other words, even though the jury acquitted the Petitioners and found that no conspiracy existed, the court below ruled that the government could try them again for the same conspiracy.

REASONS FOR GRANTING THE WRIT

I. PURSUANT TO SUPREME COURT RULE 17.1(C), THIS COURT SHOULD REVERSE THE COURT BELOW BECAUSE IT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT, NAMELY ASHE V. SWENSON, 397 U.S. 436 (1970).

In Ashe v. Swenson, 397 U.S. 436 (1970) this Court held that collateral estoppel applies to criminal prosecutions as an element of the double jeopardy clause and, therefore, the government is precluded from relitigating an issue decided in a defendant's favor after a valid final judgment. In this case the court below correctly held that the issue of whether the Petitioners were involved in a conspiracy was decided against the government when the jury found them not guilty of Count I of the indictment but directly violated the holding

in Ashe when it nonetheless held that the government could relitigate this issue in a second criminal trial against the same Petitioners. The court below inexplicably ruled that collateral estoppel is not available to these Petitioners because they chose prematurely to end the prosecution against them on Count II. Ashe simply does not allow a court to do what the court below has done by this ruling.

The court below, citing United States v. Scott, 437 U.S. 82 (1978), based its ruling on the fact that successive prosecutions which will result from its ruling were caused by the Petitioners' choice to end the prosecution of Count II without it being submitted to the jury for a determination as to their guilt or innocence. Scott has no relevance to this case. In Scott the trial judge granted a pre-trial motion to dismiss

for pre-indictment delay at the close of all of the evidence without any submission to the judge or jury of the defendant's guilt or innocence. This Court held that because no final determination of guilt or innocence by either judge or jury was made as a result of the defendant's successful motion, double jeopardy was not offended by subjecting Scott to another trial. The policy interest promoted by the Court was the "public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case". Scott, supra at 101. This case differs from Scott because the Petitioners have been tried on the alleged conspiracy, the same alleged conspiracy involved in both counts, and have been found not guilty. No evidence was excluded from the jury's consideration because the trial judge did not dismiss Count II until the end

of all of the evidence in the trial, nor was any jury instruction given to disregard any evidence as to Count II in their deliberations of the conspiracy charged in Count I. Thus, the jury verdict of not guilty of the conspiracy charged in Count I was in every sense a verdict of not guilty of Count II. Because the purpose of a new trial in this case would not be for the purpose set out in Scott, supra at 101, that case does not control here. On the contrary, the principles of collateral estoppel as set out in Ashe v. Swenson, supra, control this case and the court below should be reversed.

II. PURSUANT TO SUPREME COURT RULE 17.1(A), THIS COURT SHOULD GRANT THE WRIT BECAUSE THE COURT BELOW HAS RENDERED A DECISION THAT IS IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEAL AND IN CONFLICT WITH THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Court below has decided that the doctrine of collateral estoppel as defined in Ashe v. Swenson, 397 U.S. 436 (1970), does not apply to multi-count indictments. The government urged the adoption of this so-called multi-count exception to Ashe, supra, in United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979); United States v. Bowman, 609 F.2d 12 (D.C. Cir. 1979); and in United States v. Felder, 548 A.2d 57 (D.C. App. 1988) and in each case, it was rejected. In each of these cases, multi-count indictments were submitted to the jury, and in each case the jury reached verdicts of not guilty on some of the counts and failed to reach verdicts on the other counts. The counts for which there were verdicts and those for which there were not had issues in common, and the government urged on appeal that the common issues could be re-tried because collateral

estoppel did not apply when there were multi-count indictments. Each court decided that there is no multi-count exception to Ashe, supra, and held that the government could not re-try issues in a second trial that were adversely decided against it in the first trial. The reasoning of the courts is stated in United States v. Mespoulede, supra:

> Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

597 F.2d at 337.

The court below stands alone among the federal courts of appeals which have decided this issue in holding that Petitioners can be re-tried for the same conspiracy for which they have been found not guilty by a jury merely because there was a multi-count indictment. The Petitioners respectfully submit that the Second Circuit Court of Appeals, the District of Columbia Circuit Court of Appeals and the District of Columbia Court of Appeals have correctly ruled on the doctrine of collateral estoppel in multi-count indictment situations when juries reach verdicts in some but not all counts that have factual issues in common.

CONCLUSION

For the reasons stated herein, the Petitioners urge this Court to grant the writ of certiorari.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5153

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

ASHLEY TRANSFER & STORAGE CO., INC.;
DALE J. COOK MOVING AND STORAGE, INC.;
THOMAS W. BIVENS, SR.; JOHN D. COOK

Defendants - Appellees

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge. (CR-87-148)

Argued: June 10, 1988
Decided: October 8, 1988

Before HALL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Robert J. Wiggers (Charles F. Rule, Assistant Attorney General; Kenneth G. Starling, Deputy Assistant Attorney General; John J. Powers,

III; Constance K. Robinson, Nancy H. McMillen, Michael D. Billiel, Philip J. Thompson, DEPARTMENT OF JUSTICE; Vinton D. Lide, United States Attorney on brief) for Appellant. Lionel Stukes Lofton (Michael P. O'Connell, Parks N. Small on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

The government appeals from the district court's refusal to submit to the jury the second count of an indictment charging the defendants in count I with conspiring to fix prices in violation of the Sherman Act and in count II with conspiring to defraud the government in violation of 18 U.S.C. Section 371. The government asserts that the district court lacked discretion to refuse to submit count II and it seeks a new trial on this count. The defendants oppose the appeal, arguing that it violates the double jeopardy clause of the Constitution, as well as principles of collateral estoppel. Because count II should have been submitted

to the jury, we vacate the judgment dismissing this count. We also hold that this appeal is not barred by either double jeopardy or collateral estoppel, and we remand the case for a new trial on count II.

I

The defendants are two moving and storage companies, Ashley Transfer & Storage Co. and Dale J. Cook Moving and Storage, Inc., and three individuals, Raymond C. Harshaw (vice president of Ashley Transfer), John D. Cook (president of Dale J. Cook Moving), and Thomas W. Bivens, Sr. (president of Bivens Moving and Storage). Thomas Bivens' company had operated a moving and storage company but by the time of trial, the corporation no longer existed. The defendants operated moving and storage companies in Charleston, South Carolina. They had at various times contracted with the

United States military to provide moving and storage services for military personnel being transferred overseas.

Count I of the indictment alleged that the defendants had conspired to fix prices charged the United States for storage services at three military bases in South Carolina in violation of Section 1 of the Sherman Act.[1] Count II alleged that the defendants had conspired to defraud the United States in violation of 18 U.S.C. Section 371.[2]

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[1] Section 1 of the Sherman Act, 15 U.S.C. Section 1, provides in pertinent part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

[2] Title 18 U.S.C. Section 371, entitled Conspiracy to Commit Offense or to Defraud the United States, provides:

Both counts relied on the same factual allegations concerning: (1) the time frame of the conspiracy; (2) the coconspirators; (3) the acts alleged; and (4) the methods by which the conspiracies were carried out. The government used substantially the same evidence at the trial to prove both counts.

Before trial Bivens filed a motion, in which the other defendants later joined, requesting the court to require the government to elect between prosecuting count I or count II. The defendants argued that counts I and II were multiplicitous and that the government should not be allowed to

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> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

prosecute both counts. The district court deferred ruling on the motion and the case proceeded to trial on both counts. At the end of the trial, the district court denied the defendants' motions for judgment of acquittal. The district court did not expressly rule on the defendants' motion to require the government to elect. Instead, after referring to the motion, it in effect made the election by declining to submit count II to the jury. The jury returned a verdict of not guilty as to all defendants on count I. The district court then entered judgments acquitting the defendants on count I and dismissing count II.

II

The district court refused to submit count II to the jury because it decided that it would not sentence the defendants under both counts even if the jury found them

guilty on both. The district court never expressly ruled on the multiplicity argument raised in the defendants' motion to elect, but it implicitly approved the motion because it said that the defendants "committed only one crime" and "should be tried for that one crime." The court also remarked that "the conspiracy to violate the antitrust law is totally subsumed by the conspiracy to defraud," and that the defendants should not be "double dipped."

There is no merit to the defendants' argument that counts I and II are multiplicitous. In Blockburger v. United States, 284 U.S. 299, 304 (1932), the Supreme Court established a test of multiplicity. Where each offense requires proof of a fact not required by the other, a defendant can be punished under both statutes for a single act or transaction. Accord Abernaz v. United States, 450 U.S. 333, 338-39 (1981) (Congress

can impose multiple punishment for a single act that violates more than one statute); United States v. Tedder, 801 F.2d 1437, 1446-47 (4th Cir. 1986) (no multiplicity even though same evidence used to prove each conspiracy because conduct in question violated different statutes defining separate offenses).

Under the Blockburger test, counts I and II charged separate offenses. The Sherman Act requires a showing of an effect on interstate or foreign commerce but not an effect on the government. Section 371 requires a showing of fraud on the government but not an effect on commerce. The two statutes serve separate and distinct purposes. The Sherman Act prohibits collusive activity in restraint of trade. Section 371 forbids the perpetration of fraud against the United States government.

In United States v. Walker, 653 F.2d 1343, 1351 (9th Cir. 1981), the court held that under the Blockburger test, 18 U.S.C. Section 371 and Section 1 of the Sherman Act are two separate offenses. We concur with the Ninth Circuit and hold that the defendants' multiplicity argument is meritless.

The defendants contend that the district court did not dismiss count II but rather made a factual determination that there was insufficient evidence to support sending both counts to the jury. The defendants argue further that the trial judge's action constituted an acquittal on count II that is unappealable.

There is no support for this contention. The district judge explicitly called his ruling on count II a dismissal. Moreover, the trial judge stated that there was sufficient evidence of a conspiracy to fix

prices. Although the court entered a judgment of acquittal on count I, it did not acquit the defendants on count II.

The district court had no discretion to refuse to submit count II. Rules 8(a) and 14 of the Federal Rules of Criminal Procedure provide for the joinder of multiple offenses arising from the same acts, unless joinder would be prejudicial to defendant. In United States v. Maryland State Licensed Beverage Ass'n, 240 F.2d 420, 422 (4th Cir. 1957) we held that the government could not be forced to elect between two conspiracy counts, each alleging a violation of a different section of the Sherman Act, arising from the same conspiracy because there was no possible prejudice to the accused from trying the two counts together. Similarly, in this case the defendants would not have been prejudiced by having counts I and II tried together.

In our system, courts are not free to "interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); see also In re Grand Jury, 315 F. Supp. 662, 672-74 (D. Md. 1970). Even in those instances where Congress intended only one conviction and one sentence for the violation of two statutes, the court should instruct the jury on both counts. If the jury returns guilty verdicts for each count, the court should enter judgment on only one of the statutory offenses. Ball v. United States, 470 U.S. 856, 865 (1985). Based on this precedent, it is clear that when both counts can support separate convictions, both should be submitted to the jury. If, as here, the district judge believes only one sentence is appropriate, he can achieve that result by

combining the counts for sentencing or imposing concurrent sentences. The Sentencing Guidelines provide the procedure for imposing punishment for crimes committed after the Guidelines' effective date when a defendant is convicted on multiple counts.

The district court's refusal to submit count II to the jury and the subsequent dismissal of the count was an unauthorized intrusion upon the prerogative of the government to seek an adjudication of guilt on each count.

III

The government urges us to remand the case to the district court for a new trial of the defendants on count II. The defendants oppose this appeal generally, and remand specifically, on the grounds that retrial on count II is barred by the double jeopardy clause of the Constitution. The double

jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The defendants argue that under the "same evidence test" employed in United States v. Ragins, 840 F.2d 1184 (4th Cir. 1988), double jeopardy bars retrial on count II because essentially the same evidence which was used against the defendants in the trial on count I would suffice to convict on count II.

In Ragins, the government filed a new conspiracy indictment against a defendant who had been acquitted of conspiracy at an earlier trial. The defendant claimed that he was being reprosecuted for the same conspiracy. In determining whether the successive prosecutions involved the same offense, we employed the "same evidence test" which focused not on the formal elements of the two offenses but rather on the proof used to establish them. We stated that "the

second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged." 840 F.2d at 1188.

The Ragins "same evidence test" is inapposite here because this case does not involve successive prosecutions. Rather, the government brought both charges in a single indictment against the defendants and sought to try both charges together. The defendants' exposure to a second trial on count II is due only to their success in forestalling a proper adjudication of count II in the first trial.

The Supreme Court's decision in United States v. Scott, 437 U.S. 82 (1978), is controlling here. In Scott, the defendant was indicted for distribution of narcotics. He moved to dismiss two counts on the ground that his defense had been prejudiced by

preindictment delay. At the close of the evidence, the court granted the defendant's motion and the government appealed. The defendant argued that the government's appeal was barred by the double jeopardy clause. 437 U.S. at 100.

The Supreme Court held that because the defendant deliberately sought termination of the proceedings against him "on a basis unrelated to factual guilt or innocence of the offense of which he is accused, [he] suffers no injury cognizable under the double jeopardy clause if the government is permitted to appeal from such a ruling of the trial court in favor of defendant." 437 at 98-99. The Court explained that the purpose of the double jeopardy clause is to guard against government oppression. When a defendant's choice and not government oppression causes successive prosecutions, "no interest protected by the double jeopardy

clause is invaded when the government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant." 437 at 100; see also Jeffers v. United States, 432 U.S. 137, 150-54 (1977) (second trial permitted where defendant "was solely responsible for the successive prosecutions for conspiracy offense and the continuing enterprise offense").

Here the district court disposed of count II on a basis unrelated to the factual guilt or innocence of the defendants. Although the district court never expressly granted the defendant's motion to require election, it is clear from the record that the defendants' motion induced the court's refusal to submit count II to the jury as well as its ultimate dismissal of count II.

Following the reasoning of Scott, we hold that the double jeopardy clause does not bar the government's appeal.

IV

The defendants also argue that principles of collateral estoppel bar the government's appeal. Specifically the defendants contend that in finding them not guilty the jury determined that no conspiracy existed among them and that a new trial is precluded because the government is collaterally estopped from relitigating the conspiracy issue in a subsequent trial. The government responds that the jury could have based its verdict on other grounds and that they are therefore not collaterally estopped from relitigating the conspiracy issue.

In criminal cases, the government is collaterally estopped from retrying an issue of fact once it has been resolved in the

defendant's favor by a valid and final judgment in a criminal proceeding. If the fact necessarily determined in the first trial is an essential element of the second offense, collateral estoppel may operate as a complete bar against the subsequent prosecution. United States v. Ragins, 840 F.2d 1184, 1193-94 (4th Cir. 1988).

A defendant relying on collateral estoppel must show that the issue whose relitigation he seeks to foreclose was necessarily determined in the former trial. United States v. Head, 697 F.2d 1200, 1208 (4th Cir. 1982). Where acquittal is by general verdict, however, it is often difficult to determine what issues were necessarily determined in the defendant's favor. In Ashe v. Swenson, 397 U.S. 436, 444 (1970), the Supreme Court said:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the

> hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclosure from consideration.

The Court urged lower courts to apply collateral estoppel with "realism and rationality rather than hypertechnicality" [because] "any test more technically restrictive would amount to a rejection of the rule of collateral estoppel in criminal proceedings." 397 U.S. at 444.

The Court gave an example of an overly mechanical application of the collateral estoppel test:

> If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the

> defendant did not contest, the possible multiplicity of prosecutions is staggering. Such a restrictive definition of "determined" amounts simply to a rejection of collateral estoppel since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction.

397 at 444 n.9 (quoting Mayers & Yarbrough, Bis Vexori: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960)).

The issue contested by the parties here is whether the jury, in rendering its verdict of not guilty, necessarily determined whether a conspiracy existed among defendants. The government argues that since the Sherman Act requires a showing that defendant's activities impacted interstate or foreign commerce, the jury could have based its verdict on a finding that the government failed to prove that element. In so arguing, the government suggests that the jury may

have disbelieved substantial and uncontroverted evidence on a point the defendants did not contest.

The government presented substantial evidence at trial that the defendants' activities affected interstate or foreign commerce. Two government witnesses testified about the impact of the defendants' activities on interstate commerce. In addition, the defendants stipulated to the introduction of documentary evidence showing that the transactions between the government and the defendants implicated interstate commerce. Finally, the government argued the interstate commerce issue in its summation to the jury.

By contrast, the defendants did not introduce any evidence on the interstate commerce issue. Counsel for the defendants did not cross examine any of the government's witnesses on this issue nor did they address

the issue during opening statement or closing argument. The defendants' sole defense was that no conspiracy existed among the defendants and coconspirators to fix prices.

Finally, in a conference with counsel about jury instructions, the district judge said there was no question that the defendants' activities impacted interstate commerce.[3]

Even though the government does not contest the fact that the defendants conceded the interstate commerce issue throughout the trial, the government argues that the jury

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[3] One commentator has observed that the interstate commerce issue is essentially a nonissue in most Sherman Act cases:

> Once one focuses on the inherent effects of a trade restraint in a national economy together with the long-held rule that the magnitude of interstate effects is irrelevant, there are astonishingly few offenses to antitrust principles that do not 'affect commerce.' Areeda & Hovenkamp, Antritrust Law Section 231.1 (Supp. 1987).

was nevertheless "troubled by" the issue because it asked the judge to repeat the instruction on the issue. After some deliberation, the jury asked the judge to "go over the law of conspiracy and the law of trade and commerce." We cannot agree with the government that this broad request signified that the jury was "troubled" over the interstate commerce issue. The trial judge read the jury over 30 pages of instructions on numerous topics including the elements of a Section 1, Sherman Act violation. Given the prolixity and complexity of the jury instructions, it is not remarkable that the jury asked the judge to repeat parts of the instructions.

In summary, the government presented substantial evidence on the interstate commerce issue which the defendants did not even attempt to controvert. Consistent with the Supreme Court's admonition in Ashe, 397

U.S. at 444, we cannot say that the jury could have based its acquittal on its disbelief of the government's evidence.

Since the jury could not rationally have based its acquittal on the interstate commerce issue, it must have acquitted the defendants on a finding that no conspiracy existed among the defendants. Ordinarily the government would therefore be collaterally estopped from retrying the conspiracy issue in a subsequent trial.

If the government is collaterally estopped from relitigating the conspiracy issue in a subsequent trial, collateral estoppel operates as a complete bar against a new trial because proof of the conspiracy is an essential element of count II. See United States v. Ragins, 840 F.2d at 1193-94. Where collateral estoppel operates as a complete bar against a subsequent prosecution, collateral estoppel is coextensive with

double jeopardy. Phillips v. United States, 502 F.2d 227, 230 n.14 (4th Cir. 1974).

Where collateral estoppel becomes coextensive with double jeopardy, the same considerations which governed the Supreme Court's decision in United States v. Scott, 437 U.S. at 98-100, control. Specifically, where the government has made no effort to prosecute the charges seriatim, the "considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1983) (dictum).

Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy.

We vacate the district court's judgment dismissing count II and remand for a new trial.

VACATED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-5153

United States of America

Plaintiff-Appellant

versus

Ashley Transfer & Storage Co., Inc., et al

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Hall and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK